United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2165

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2165

JOSEPH DEL VECCHIO,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

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Preliminary Statement

Joseph Del Vecchio appeals from a memorandum and order filed November 15, 1976, in the United States District Court for the Southern District of New York by the Honorable Kevin T. Duffy, United States District Judge, denying Del Vecchio's petition pursuant to 28 U.S.C. § 2255 seeking withdrawal of his plea of guilty entered on January 14, 1974, and vacation of the judgment of conviction entered thereon.

Indictment 73 Cr. 1099,* filed December 6, 1973, charged Joseph Del Vecchio, a/k/a "Joe Crow," along

* Indictment 73 Cr. 1099 superseded indictments 73 Cr. 931 and 73 Cr. 334, filed October 3, 1973 and April 13, 1973, respectively.

with Carmine Tramunti and thirty others with thirty counts of violations of the Federal narcotics laws. Del Vecchio was named in nine of the thirty counts.

Count One charged all thirty-two defendants, including Del Vecchio, with conspiracy to violate the narcotics laws from January 1, 1969 until December 6, 1973, the date of the filing of the indictment, in violation of Title 21, United States Code, Sections 173, 174 and 846.

Counts Three and Four charged Del Vecchio and Louis Inglese, a/k/a "GiGi," with receiving, concealing and facilitating the transportation and concealment of 30 bags of heroin on one occasion and one-half ounce of heroin on another in June 1969, in violation of Title 21, United States Code, Sections 173 and 174.

Counts Eleven, Twelve, and Thirteen charged Del Vecchio, Inglese and Donato Christiano, a/k/a "Finnegan," with receiving, concealing and facilitating the transportation and concealment of one-quarter kilogram quantities of heroin on three separate occasions in November 1970, in violation of Title 21, United States Code, Sections 173 and 174.

Counts Twenty-Three and Twenty-Four charged Del Vecchio, Thomas Lentini, a/k/a "Moe," and Joseph Ceriale, a/k/a "Joe Red," with distributing and possessing with intent to distribute on two different occasions approximately three kilograms of heroin in violation of Title 21, United States Code, Sections 821, 841(a)(1) and 841(b)(1)(A).

Count Twenty-Seven charged Del Vecchio, Carmine Tramunti, Inglese and Ceriale with distributing and possessing with intent to distribute three kilograms of heroin in May 1973.

On January 14, 1974, Del Vecchio entered a plea of guilty before Judge Duffy to seven counts of the indictment: Counts One, Eleven, Twelve, Thirteen, Twenty-Three, Twenty-Four and Twenty-Seven.

Trial proceeded against eighteen of the remaining defendants* one week later and resulted in the convictions of fifteen of them for both the conspiracy and all the related substantive offenses.**

On appeal, the convictions of thirteen defendants were affirmed by this Court,*** which concluded that the evidence at trial "established the existence of a large, well organized conspiracy to buy, possess and distribute narcotics in New York, New Jersey and Washington,

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* Prior to trial, two other defendants pleaded guilty. The Government severed the cases of the remaining defendants, all but two of whom were fugitives at the time of trial. George Tatouian, a defendant in indictment 73 Cr. 1099, was murdered prior to trial. One of the defendants named in the superseded indictment, 73 Cr. 931, Jack Spada, was also murdered prior to trial and "was found riddled with bullets and both hands hacked off at the wrists." *United States* v. *Mallah*, 503 F.2d 971, 976 n.2 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

** Judge Duffy entered a judgment of acquittal at the end of all the evidence with respect to the defendant Joseph Marchese. The case against Al Greene was severed when he fell down a flight of stairs and fractured his skull during the trial. The jury convicted all defendants whose guilt was submitted to them except one. The jury was unable to reach a verdict as to one defendant who, according to the trial testimony, was one of the most decorated police officers in the history of the New York City Police Department. An order of *nolle prosequi* was subsequently entered with respect to the case against him.

*** This Court ordered that the indictment against one defendant be dismissed and reversed and remanded as to defendant Henry Salley, whose lawyer had died during the course of the trial.

D.C." *United States* v. *Tramunti*, 513 F.2d 1087, 1094 (2d Cir. 1975). The Supreme Court denied certiorari, 423 U.S. 832 (1975).*

On May 20, 1974, Judge Duffy sentenced Del Vecchio to fifteen years imprisonment on Count One, with three years special parole to follow upon completion of his prison term, and five years on each subsequent count, all sentences to run concurrently.

Two and one-half years later, on October 21, 1976, Del Vecchio's new attorney filed an affidavit and petition, pursuant to 28 U.S.C. § 2255, seeking to set aside and

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* After this Court's affirmance of the judgments of conviction at the first trial, a second trial of defendants in the *Tramunti* indictment was begun, along with certain other defendants named in superseding indictment S 75 Cr. 1112, *United States* v. *Taylor, et al.* This trial resulted in the conviction of an additional three of the defendants named in the Tramunti indictment. Al Green, whose case was severed during the first trial, was convicted in the second. Henry Salley, whose conviction was reversed by this Court, was again convicted. Basil Hansen, a fugitive at that time of *Tramunti* trial, was apprehended after the conclusion of the *Tramunti* trial and tried and convicted in the *Taylor* case. He escaped from Metropolitan Correction Center, however, prior to sentence and remains at large.

Hansen's wife, Estelle Hansen, a/k/a "Bunny", also a fugitive at the time of the *Tramunti* trial, later surrendered and pleaded guilty to bail jumping in satisfaction of all the charges then pending against her.

Carmine Pugliese, a fugitive at the time of the first trial, was later found murdered.

Thus, of the defendants charged in the *Tramunti* indictment, four pleaded guilty, sixteen were convicted after trial, three were murdered, one was acquitted by the trial court, this Court directed that the indictment be dismissed against another, one was never competent to stand trial, orders *nolle prosequi* were entered as to three, three remain fugitives, and one, John Doe a/k/a "Jimmy Wyatt Earp", was never identified.

vacate Del Vecchio's sentence and to permit Del Vecchio to withdraw his guilty plea, or, in the alternative, for an evidentiary hearing, on the grounds (1) that Del Vecchio was not advised that the Count was required to impose at least a three year term of special parole to follow any term of imprisonment, and (2) that Del Vecchio was not advised at the time of his plea of a minimum mandatory penalty and ineligibility for parole.

On November 12, 1976, Judge Duffy denied the petition without a hearing.

This appeal followed.

Statement of Facts

On January 14, 1974, Joseph Del Vecchio pleaded guilty to seven counts—Count One, Eleven through Thirteen, Twenty-Three, Twenty-Four and Twenty-Seven—of the indictment 73 Cr. 1099. Del Vecchio thereby acknowledged his involvement in what this Court termed a "large, well-organized conspiracy to buy, possess and distribute narcotics in New York, New Jersey and Washington, D.C." 513 F.2d at 1094, and in the distribution of nine and three quarter kilograms of heroin over a period of two and a half years. At that time the Court instructed Del Vecchio, and his counsel, Gino Gallina, Esq., as follows:

> "Before I can accept a plea of guilty, it is necessary for me to be sure that you are acting voluntarily, with a complete understanding of your rights, and that you understand the consequences of your plea and that in fact you are gulity." (A. 14a-15a).*

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* References to "A." are to pages of the appellant's appendix; references to "Br." are to pages of Del Vecchio's Brief.

The District Court then attempted, through a lengthy series of questions to insure that these factors were complied with. (A. 15a-17a). In the course of these questions, the following colloquy took place with respect to the potential sentence Del Vecchio could receive:

> The Court: Do you know that for each of the counts in the indictment, you could be sentenced to a term of fifteen years, and if this second offender information is filed that they are talking about, it could be possible maximum of thirty years?
>
> Del Vecchio: Yes Sir.
>
> The Court: Has anyone suggested to you in any way that there is an understanding about what kind of sentence you would get?
>
> Del Vecchio: No, sir. (A. 16a).

Judge Duffy thus advised Del Vecchio that upon his plea of guilty he faced up to two hundred ten years of imprisonment. Judge Duffy's advice to Del Vecchio with respect to the sentence that could be imposed was not, however, accurate in all respects. Counts Eleven, Twelve and Thirteen (the "old law counts") charged violations of Title 21, United States Code, Sections 173 and 174, the federal narcotics laws which apply to violations occurring prior to May 1, 1971. As to each of these counts, the sentence is a minimum of five years imprisonment and a maximum of twenty years per count.

Counts One, Twenty-Three, Twenty-Four and Twenty-Seven (the "new law" counts) charged violations of Title 21, United States Code, Sections 846 and 812, 841(a)(1) and 841(b)(1)(A), the Federal narcotics laws which apply to violations occurring on or after May 1, 1971. These counts carry no minimum penalty, a maximum of

15 years imprisonment and a special parole term of three years, which must follow any term of incarceration. Title 21, United States Code, Sections 841(b)(1)(A), 846 and 851.

Prior to the plea, the Assistant United States Attorney informed Del Vecchio and the court that the Government planned to file an information charging Del Vecchio as a second narcotics offender. This was predicated upon Del Vecchio's guilty plea to a charge of use of a communication facility in furtherance of a narcotics transaction, Title 21, United States Code, Section 843(b), upon which he had been sentenced to three years imprisonment by Judge Gagliardi. With respect to the old law counts, this would have increased the prison sentence to a minimum of ten years and a maximum of forty years on each count. Title 21, United States Code, Section 174. The maximum sentence on the new law counts would have been thirty years followed by a mandatory six years of special parole. Title 21, United States Code, Section 841(b)(1)(A).* Thus, although Judge Duffy did not advise Del Vecchio of the mandatory minimum sentence applicable to the old law counts or of the mandatory special parole term applicable to the new law counts, he did advise him that he faced a total of up to two hundred ten years of confinement.

One week after Del Vecchio pleaded guilty, trial proceeded against eighteen of his co-defendants who were available for trial. The evidence at trial disclosed that the Government witness Frank Stasi assisted Del Vecchio in at lease eight "mixing sessions," some at Stasi's apartment, some at Del Vecchio's. 513 F.2d at 1096. "In each of these he, Del Vecchio [and others] mixed three kilograms of heroin with the dilutant mannite to obtain

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* The Government never actually charged Del Vecchio as a second offender, and he was thus not sentenced as such.

12 half-kilogram packages." 513 F.2d at 1096. Del Vecchio played a substantial role in distributing this heroin and assisted one of the principals, Louis Inglese, a/k/a "Gigi," in counting the proceeds. 513 F.2d at 1096. Thus, Del Vecchio played a major role in the dilution and distribution of almost one hundred half-kilogram packages of heroin.

On May 20, 1974, Judge Duffy sentenced Del Vecchio to fifteen years imprisonment on Count One followed by three years of special parole to commence upon completion of his prison term. He sentenced Del Vecchio to five years incarceration on each of the six remaining counts. All sentences were to run concurrently with each other and concurrently with the sentence of three years previously imposed by Judge Gagliardi. No suggestion was made at that time by Del Vecchio or by his attorney Mr. Gallina that the special parole term—or, indeed, the sentence—came as a surprise. Del Vecchio did not appeal his guilty plea or sentence.

On October 21, 1976, almost two and a half years after sentencing, Del Vecchio filed his present petition under Section 2255. The only support for the petition was an affidavit of Del Vecchio's new counsel which merely claimed that because Judge Duffy failed to advise Del Vecchio of the mandatory special parole term or of a mandatory minimum sentence before accepting his guilty plea, the judgment of conviction and sentence should be vacated. In the alternative, he asked that an evidentiary hearing be held on this issue during which Del Vecchio should be released. Del Vecchio filed no affidavit of his own. Indeed, Del Vecchio did not claim that he would not have entered his guilty plea had Judge Duffy advised him of either of the mandatory special parole term or of the mandatory minimum sentence, nor did Del Vecchio even suggest that he was unaware at the time of the plea that a mandatory special parole term or a five year

prison term was mandatory. Rather, Del Vecchio's contention was simply that the failure of Judge Duffy to comply with all the formal requirements of Rule 11 of the Federal Rules of Criminal Procedure automatically required that his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 be granted.

Judge Duffy, on November 12, 1976, denied the petition without a hearing, concluding that the claim that failure to advise Del Vecchio of the special parole term entitled him to withdraw his guilty plea was without merit. As to the failure to advise Del Vecchio of the mandatory minimum sentence, Judge Duffy found that, in light of the charges to which Del Vecchio had pleaded guilty, a discussion of Del Vecchio's ineligibility for parole was needless (A. 5a-6a).

ARGUMENT

The District Court Properly Denied Del Vecchio's Petition.

Del Vecchio's primary claim in this Court, as in the District Court, is simply put. The record of the taking of his guilty plea discloses that the District Judge did not comply with the formal requirements of Rule 11 of the Federal Rules of Criminal Procedure then in effect *

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* At the time of Del Vecchio's guilty plea, Rule 11 read in pertinent part as follows:

> "The court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Rule 11 was amended — and rendered more strict, see *United States* v. *Journet*, 544 F.2d 633, 635 (2d Cir. 1976), effective August 1, 1975.

because he did not advise the defendant (1) that the offense to which he was pleading guilty required, if Del Vecchio were sentenced to a term of imprisonment, that a mandatory three-year period of special parole must also be imposed and (2) that Del Vecchio was "ineligible for immediate parole in that he was obliged to serve a minimum mandatory sentence." (Br. at 5). Del Vecchio claims that either of these shortcomings requires vacation of his sentence.

The latter claim can be quickly disposed of. Though it confuses the requirement of a mandatory minimum sentence and ineligibility for parole—both of which were applicable to the old law counts * and neither of which Del Vecchio was informed of at the time of his plea—neither assertion has merit. Del Vecchio's claim that the failure to advise him of his ineligibility for parole entitles him to withdraw his guilty plea is moot. Congress in 1974 passed Pub. L. No. 93-481, 88 Stat. 1455, which amended the Comprehensive Drug Abuse Prevention and Control Act of 1970, and made parole available to persons sentenced under the old narcotics law, which were repealed by the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, as well as those sentenced under the new laws. *Herrera* v. *United States*, 507 F.2d 143 (5th Cir. 1975); 21 U.S.C. § 321 (Supp. 1975). Therefore, the fact that three of the seven counts to which Del Vecchio pleaded guilty were violations of the old narcotics laws does not affect his eligibility for parole.

The old law counts to which Del Vecchio pleaded guilty also carried a mandatory minimum sentence. Since

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* Title 21, U.S.C. Section 174 specifically incorporated Title 26, U.S.C., Section 7237(d) which made the parole provisions of Title 18 inapplicable to sentences under Title 21, U.S.C., Section 174.

the remaining counts carry no mandatory minimum, and the sentences on these counts were as long as or longer than those on the old law counts, Del Vecchio plainly suffered no prejudice. In any event, under the concurrent sentence doctrine, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied, sub nom., Ciuzio* v. *United States*, 416 U.S. 995 (1974); *United States* v. *Gaines*, 460 F.2d 176 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *United States* v. *Cilenti*, 425 F.2d 683 (2d Cir. 1970); *United States* v. *Febre*, 425 F.2d 107 (2d Cir.), *cert. denied*, 400 U.S. 849 (1970), allowing Del Vecchio to withdraw his plea of guilty would make no difference to the sentence he is serving. Indeed, both this Court, *United States ex rel. Weems* v. *Follette*, 414 F.2d 417, 419 (2d Cir. 1969), *cert. denied*, 397 U.S. 950 (1970), and the Supreme Court, *Benton* v. *Maryland*, 395 U.S. 784, 793 n.11 (1969), have noted that application of the concurrent sentence doctrine is particularly appropriate in collateral attacks as opposed to direct review of convictions.

With respect to the first claim, Del Vecchio argues that, since this Court has held that Rule 11 of the Federal Rules of Criminal Procedure requires that a "defendant . . . be advised that . . . [a special parole term] will be imposed . . . [and] also be asked by the court if he understands that fact" before his guilty plea may be accepted, *Michel* v. *United States*, 507 F.2d 461, 463 (2d Cir. 1974), he is entitled to have his conviction and sentence vacated under *McCarthy* v. *United States*, 394 U.S. 459 (1969) and *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975).

A petition under section 2255 must be denied without a hearing if it does not contain averments which, if true,

would entitle the petitioner to relief under that section. *Dalli* v. *United States*, 491 F.2d 758, 760-761 (2d Cir. 1974). See generally *Taylor* v. *United States*, 487 F.2d 307 (2d Cir. 1973). The initial inquiry is, therefore, whether Del Vecchio's concededly accurate claim—that, on the voir dire of his guilty plea, Judge Duffy failed to mention special parole as part of the potential punishment to which Del Vecchio was subjecting himself by pleading guilty—entitles Del Vecchio to relief under section 2255. Del Vecchio is not entitled to such relief for three independent and cumulative reasons. First, his claim does not present the kind of "miscarriage of justice" that can be raised in a section 2255 petition. Second, the error in the taking of his plea was harmless under the circumstances. And finally, his failure to raise the issue on a direct appeal of his guilty plea and sentence bars review under section 2255.

A. Del. Vecchio's Petition Failed To State a Claim That Can Be Raised By a Petition Pursuant to 28 U.S.C. § 2255.

It cannot be disputed that Del Vecchio, thirty years old at the time of his plea, was advised that as a result of his guilty plea he could be incarcerated for, in addition to the three years previously imposed by Judge Gagliardi which Del Vecchio was then serving, up to two hundred ten years, a period spanning three normal lifetimes. Del Vecchio's plea was by no stretch of the imagination an attempt by pleading guilty to a reduced number of counts to limit his exposure to jail time. Del Vecchio's plea was not the result of a bargaining process where even a slight change in the potential penalty might effect the decision to plead guilty. Rather, Del Vecchio, a hardened and repeated narcotics offender, by confessing

guilt and pleading guilty to almost every count against him—seven or nine counts—obviously hoped to gain leniency from the court and to avoid a trial where his conviction was a certainty.* Indeed, trial proceeded against eighteen defendants and evidence of Del Vecchio's dealings in massive amounts of heroin on a highly organized basis over a period of years littered almost every page. It could fairly be said that Del Vecchio's direct involvement in the scheme on trial was second only to that of co-defendant Louis Inglese, a/k/a "Gigi," who received a forty-year sentence consecutive to a fifteen year sentence previously imposed on him. Thus, Del Vecchio's plea was a calculated and successful attempt to gain leniency from the District Court and was not and could not have been motivated in any way by the existence of a special parole term. Under the circumstances, Judge Duffy's failure to comply with all the formal requirements of Rule 11 in advising him of the potential sentence resulted in no prejudice to Del Vecchio and amounted to nothing more than a technical error that cannot be raised on a petition for collateral review.

In *Davis* v. *United States*, 417 U.S. 333, 346 (1974) the Supreme Court stated:

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of an indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which

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* See footnotes on pages 3 and 4, *supra*.

> inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Id.*, at 428 (internal quotation marks omitted).*

In *Hill* v. *United States*, 368 U.S. 424 (1962), the Supreme Court had earlier made it clear that mere technical non-compliance with a Rule of Criminal Procedure was not a sufficient ground for collateral attack. *Hill* involved the failure by the District Court to permit the defendant to speak on his own behalf prior to the imposition of sentence, as required by Rule 32(a) of the Federal Rules of Criminal Procedure. Although the Supreme Court had earlier agreed, *Green* v. *United States*, 365 U.S. 301 (1961), that the right was an ancient and valuable one indisputably and mandatorily preserved by Rule 32(a)—indeed, one might suggest, at least as valuable as the right Del Vecchio claims here—the Court in *Hill* at 428:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by writ of habeas corpus

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* In *Davis*, in marked contrast to this case, if petitioner's contention was well taken, then his "conviction and punishment are for an act that the law does not make criminal," 417 U.S. at 346. Accordingly, the Supreme Court held that Davis' claim could be raised on a § 2255 motion.

> is apparent.' *Bowen* v. *Johnston*, 306 U.S. 19, 27. See *Escoe* v. *Zerbst*, 295 U.S. 490; *Johnson* v. *Zerbst*, 304 U.S. 458; *Walker* v. *Johnston*, 312 U.S. 275; *Waley* v. *Johnston*, 316 U.S. 101".

Specifically contrasting the relief available under Section 2255 with what might have been the opposite outcome had the case been before it on direct appeal, 368 U.S. at 429, the Court held:

> "Whether § 2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." *Id.* at 429 (footnote omitted).

The claim for relief in *Hill* was, of course, far stronger than here because if Hill had prevailed the result would only have been a resentencing, whereas here, the practical result of granting Del Vecchio's claim would be to set him free.*

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* Indeed, it is appropriate to note that Del Vecchio, far from being the victim of a "miscarriage of justice," as required by *Davis* and *Hill* to raise an issue cognizable in a 2255 petition, would benefit from an extraordinary and ill-deserved windfall were this Court to accept his argument. Since the time of his guilty plea and the *Tramunti* trial, Frank Stasi, the principal witness against him (see 513 F.2d at 1096), died. It would thus now—more than three years after his plea of guilty—be difficult and probably impossible for the Government to demonstrate Del Vecchio's self-confessed complicity in the overwhelmingly hardened and vicious criminal activities of which he was a part. In such a case, the "miscarriage of justice" would only accrue to the public.

Similarly, in *Kloner* v. *United States*, 535 F.2d 730, 733 (2d Cir. 1976), this Court held, with respect to a requirement of Rule 11 prior to its 1975 amendment:

> A guilty plea will not be invalidated simply because of the district court's failure, during its Rule 11 inquiry, to enumerate one or more of the rights waived by the defendant. [citations omitted.] Instead, since "[t]he nature of the inquiry required by Rule 11 must necessarily vary from case to case," *McCarthy* v. *United States*, 394 U.S. at 467 n. 20, 89 S. Ct. at 1171, 22 L.Ed. 2d at 426; *Seiller* v. *United States*, Dkt. No. 75-2002, Slip. Opin. 6525-26 (2d Cir. Dec. 1, 1975); *Irizarry* v. *United States*, 508 F.2d 960, 965 n.4 (2d Cir. 1975), a resulting plea may be upheld as long as the district judge has adequately informed the defendant of "the alternative courses of action open to" him, *North Carolina* v. *Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L.Ed. 2d 162, 168 (1970), so that the defendant has not, either because of ignorance or misinformation, been misled into entering the plea.

Del Vecchio was plainly not misled into entering his plea and his claim presents none of the "exceptional circumstances" that would result in a "complete miscarriage of justice" as required by *Davis* and *Hill*. Indeed, Del Vecchio has demonstrated, and can demonstrate, no prejudice whatever. See pp. 19-24, *infra*.

Del Vecchio relies (Br. at 4), however, on *McCarthy* v. *United States*, 394 U.S. 459 (1969), for the proposition that a defendant is entitled to withdraw a guilty plea "if a United States District Court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." The remedy announced in *McCarthy* for non-compliance with Rule 11 was specifi-

cally said to be provided under the Supreme Court's supervisory powers, 394 U.S. at 464, not on a constitutional or statutory basis, and was allowed in the context of a direct appeal from a judgment of conviction, not on post-conviction collateral attack under 28 U.S.C. § 2255. Nothing in *McCarthy* suggests that the same remedy is automatically available under section 2255 or that any manner of non-compliance with Rule 11 may be sufficient grounds for relief under section 2255. Although the Supreme Court has not directly qualified the *McCarthy* rule in a case brought under section 2255, *Davis*, *supra*, and *Hill*, *supra*, make it clear that the petitioner should not be perimtted to set aside his conviction two and a half years after it became final, when trial would be virtually impossible.

Although in recent decisions in cases involving post-conviction collateral attacks for non-compliance with Rule 11, this Court has vacated judgments of conviction without explicitly considering whether "automatic reversal" rule in *McCarthy* is fully applicable in proceedings under section 2255, *e.g.*, *Irizarry* v. *United States*, 508 F.2d 960, 968 (2d Cir. 1975); *Ferguson* v. *United States*, *supra*; *Rizzo* v. *United States*, 516 F.2d 789 (2d Cir. 1975), those decisions are distinguishable on two grounds. First, in none of those decisions was the cognizability of the defendant's claim under section 2255 either briefed, argued or discussed by this Court in its opinion. Thus, the decisions must be seen in the light of the later decision in *Kloner* v. *United States*, *supra*, in which the Court concluded, on the basis of *Davis* v. *United States*, *supra*, and other cases, that collateral attack is available to correct Rule 11 deficiencies under circumstances considerably more limited than those involved in this case. Second, the inadequacies of the guilty plea procedures in each of those cases were far more extensive than in this case, and indeed amounted

to a demonstration of possible lack of voluntariness or other "miscarriage of justice" that is clearly cognizable on collateral attack.* Indeed, that mere non-compliance with Rule 11 is not of itself a sufficient ground for collateral relief under Section 2255 was made clear in this Circuit in Judge Friendly's concurring opinion in *Manley* v. *United States*, 432 F.2d 1241, 1246, 1247 (2d Cir. 1970) (en banc).

In other Circuits, the distinction between the "automatic reversal" provided by *McCarthy* on direct appeal and the far more restricted availability of relief under section 2255 for non-compliance with Rule 11 has been frequently emphasized. *United States* v. *Blair*, 470 F.2d 331, 340 n.21 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *Limon-Gonzalez* v. *United States*, 499 F.2d 936, 937-938 (5th Cir. 1974); *United States* v. *Maggio*, 514 F.2d 80, 87 (5th Cir.), *cert. denied*, 423 U.S. 1032

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* In *Irizzary*, there was no showing that the defendant even understood the nature of the crime to which he was pleading guilty. In addition, this Court noted that there was an insufficient factual basis for the plea in the record. Similarly, in *Rizzo* the defendant simply did not admit certain elements of the offense to which he pleaded guilty, and indeed this Court noted that "every indication on the record" pointed to a conclusion that the defendant did not in fact commit the crime of which he was convicted. In *Ferguson*, the defendant received consecutive sentences that amounted to a total sentence far in excess of the amount that he understood he would receive when he pleaded guilty. In addition, one of the decisions upon which the *Ferguson* panel relied—the Eighth Circuit's decision in *United States* v. *Richardson*, 483 F.2d 516, 518-19 (8th Cir. 1973)—was subsequently overruled by that Circuit in a decision that strongly supports the Government's position in this case. *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976). The other claimed precedent, *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974) was, as the Seventh Circuit noted in *Bachner* v. *United States*, 517 F.2d 589, 591 (7th Cir. 1975), decided without the benefit of the Supreme Court's distinctly inconsistent decision in *Davis* v. *United States*, *supra*.

(1975); *United States* v. *Smith*, 440 F.2d 521, 527-529 (7th Cir. 1971) (Stevens, *C.J.*, dissenting); *Arias* v. *United States*, 484 F.2d 577, 579 (7th Cir. 1973) (Stevens, *C.J.*), *cert. denied*, 418 U.S. 905 (1974); *Gates* v. *United States*, 515 F.2d 73, 76-77 (7th Cir. 1975); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975); *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976); *Weisser* v. *Ciccone*, 532 F.2d 101, 104 (8th Cir. 1976) (Webster, *C.J.*, concurring); *Sappington* v. *United States*, 523 F.2d 858, 860 (8th Cir. 1975) (Webster, *C.J.*, concurring).

This conclusion does not denigrate the important principles underlying the rule announced in *McCarthy*.* Rather, it merely tempers them with the recognition that the importance of finality in criminal cases requires that a substantial deprivation of a defendant's rights occur before he can attack his conviction collaterally. To vacate Del Vecchio's conviction because Judge Duffy did not tell Del Vecchio something Del Vecchio has not claimed he did not know and something which could not conceivably have made any difference to him in any event would be a mockery of justice.

B. Del Vecchio Does Not—And Cannot—Demonstrate Any Prejudice.

Wholly apart from the foregoing, there are additional deficiencies in Del Vecchio's petition that warranted its summary denial. First, quite apart from his failure to claim that he was in fact unaware to the possibility of a

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* We do submit, though, that those principles have far greater force when the record inadequately reflects the factual basis for the plea, as in *McCarthy*, than they do in the present context, particularly in the circumstances of this case.

mandatory special parole term,* Del Vecchio made no claim below that he would have acted any differently had Judge Duffy advised him that he subjected himself by his guilty plea to a mandatory special parole term, as required by *Bye* v. *United States*, 435 F.2d 177, 179 n.5 (2d Cir. 1970). Indeed, Del Vecchio could not credibly make a claim that he was ignorant of or misled about his alternatives at the time of the plea. Not only was Del Vecchio a hardened criminal who had previously been convicted of a separate narcotics offense, *see Aviles* v. *United States*, 405 F. Supp. 1374, 1380-85 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 307 (2d Cir.), *cert. denied*, 425 U.S. 961 (1976), but, as this Court has recently had occasion to note, *Abraham* v. *United States*, Dkt. No. 76-2135, slip op. 1151 (2d Cir. January 21, 1977), the attorney representing him at the time of his guilty plea was unusually experienced in representing defendants charged with violations of the federal narcotics laws.

But even that aside, since the sentence imposed on Del Vecchio—fifteen years imprisonment and three years special parole—was substantially less than the thirty years imprisonment on each count of which he was warned by Judge Duffy when he pleaded guilty, Del Vecchio would be entitled to no relief under section 2255 even if it had been claimed that Del Vecchio was unaware of the possibility that a special parole term might be imposed and would not have pleaded guilty if he had known. In short, even if there was error in the taking of the guilty plea, particularly in the context of a belated collateral

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* At page 10 of his brief, Del Vecchio states that he has asserted "that he was unaware of his rights at the time of the entry of the plea. . . ." This is sheer misstatement. Del Vecchio has never so stated.

attack * the error was harmless. *Poerio* v. *United States*, 405 F. Supp. 1258, 1262-63 (E.D.N.Y. 1975), (Judd, J.). Other circuits that have ruled on this problem have reached a similar conclusion, as noted by Judge Palmieri in *Aviles* v. *United States*, *supra*, 405 F. Supp. at 1380-81. See *Bachner* v. *United States*, *supra*, 517 F.2d at 596-597; *Bell* v. *United States*, 521 F.2d 713 (4th Cir.), *cert. denied*, 424 U.S. 918 (1975); *McNamara* v. *United States*, Dkt. No. 75-2136 (4th Cir., November 4, 1975). *See also*, *Barton* v. *United States*, 458 F.2d 537 (5th Cir. 1972) (defendant told he "could get up to about 140 years"); *United States* v. *Woodall*, 438 F.2d 1317, 1328-1329 (5th Cir.) (en banc), *cert. denied*, 403 U.S. 933

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* As this Court has noted, a collateral attack on a guilty plea made "only belatedly" should be viewed with particular circumspection, *Seiller* v. *United States*, 544 F.2d 554, 568 (2d Cir. 1975), and does not merit a hearing. Given the equities of the Government's present inability to try Del Vecchio for his admitted participation in the crimes for which he was charged, Del Vecchio's delay in complaining of what he was not told at the time of his guilty plea not only negates any possibility that he was not aware of the special parole term (which, at the very least, must have been clear to him at the time of sentence) but should bar him from receiving present relief.

It should be noted that Del Vecchio has never presented any affidavit from his attorney at the time of his guilty plea indicating that the attorney did not advise Del Vecchio of the mandatory special parole term. This Court has noted that when a section 2255 petition claims ignorance or misunderstanding on an issue about which the defendant's attorney had knowledge, failure to present an affidavit from the attorney is itself reason to deny a claim without holding a hearing. *United States* v. *Wisniewski*, 478 F.2d 274, 284 (2d Cir. 1973); *United States* v. *Santelises*, 476 F.2d 787, 790 n.3 (2d Cir. 1973); *Grant* v. *United States*, 451 F.2d 931, 933 (2d Cir. 1971). While the Government does not concede that the submission of such affidavits would have entitled Del Vecchio to a hearing, we do note that he submitted neither his own affidavit nor that of Mr. Gallina, his attorney at the time of his guilty plea in this case.

(1971). But see *United States* v. *Yazbeck*, 524 F.2d 641, 643 (1st Cir. 1975); *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974); *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).* There simply could not have been any prejudice to Del Vecchio in view of the fact that the total period of imprisonment and special parole to which he was sentenced was ninety-two years less than the period of imprisonment that Judge Duffy warned Del Vecchio he faced before accepting his guilty plea.**

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* As noted earlier in this brief, of the decisions in other Circuits that arguably might be inconsistent with our position, *Roberts* was decided without the benefit of the Supreme Court's decision in *Davis; Yazbeck* similarly did not discuss the appropriateness of pursuing relief under section 2255 in these circumstances; and *Richardson* was subsequently overruled in *McRae* v. *United States*, *supra*. Thus, the Circuits that have directly confronted the arguments made here have been unanimous in rejecting the apparent rationale asserted by Del Vecchio.

** Although in *Bye* v. *United States*, *supra*, 435 F.2d at 180, this Court declined to give weight to the factor that the term of imprisonment actually imposed would require less time in jail, even absent the availability of parole, than would the maximum penalty of which *Bye* had been warned, *Bye* turned on the point that "[t]he danger is that the accused makes his decision to plead guilty underestimating by a factor of three the risk of prolonged mandatory incarceration." *Id.* However, it is not generally the law in this Circuit or elsewhere that misadvice of less significance as to the range of possible penalties requires repleading, absent any prejudice flowing from the sentence actually imposed, *e.g.*, *United States* v. *Vermeulen*, 436 F.2d 72, 74 & n.1 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); *United States* v. *Dorszynski*, 524 F.2d 190, 194 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *Eakes* v. *United States*, 391 F.2d 287, 288 (5th Cir. 1968); *United States* v. *Woodall*, *supra*, 438 F.2d at 1328-29; *Bell* v. *United States*, *supra; cf. Mordecai* v. *United States*, 421 F.2d 1133, 1139 (D.C. 1969), *cert. denied*, 397 U.S. 977 (1970), but see *United States* v. *Jasper*, 481 F.2d 976 (3d Cir. 1973), and the nature of the special parole term is quite different from the unavailability of parole under the now superseded narcotics law under consideration in *Bye*:

[Footnote continued on following page]

Ferguson v. *United States*, *supra*, does not provide to the contrary. In *Ferguson*, the defendant claimed that he would not have pleaded guilty if he had known of the

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> "Failure to advise a defendant of the mandatory parole term does not inherently result in complete miscarriage of justice. Unlike ineligibility for parole, which 'automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances,' *United States* v. *Smith*, *supra*, 440 F.2d at 525 (emphasis in original), the mandatory parole term has no effect on the period of incarceration and does not ever become material unless the defendant violates the conditions of his parole. It would be as unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it would be to assume that he would be influenced by other contingencies he is not advised about. For example, if he is released early by reason of earned good time, he will be deemed to be on a parole until the end of the term of his sentence and hence will be subject to being reincarcerated if he violates parole conditions. 18 U.S.C. §§ 4161-4164. Good time he has earned while he is a prisoner may be forfeited if he commits an offense or violates a rule of the institution. 18 U.S.C. § 4165. Also, the date the defendant will be eligible for parole will depend on whether the judge leaves it to be governed by 18 U.S.C. § 4202; specifies an eligibility date before the expiration of one-third of the sentence, as permitted by 18 U.S.C. § 4208(a)(1); or specifies that the prisoner shall be eligible at such time as the board of parole may determine, as permitted by 18 U.S.C. § 4208(a)(2). These contingencies are too remote from the considerations that may reasonably be expected to motivate a defendant's plea decision to be of legal significance." *Bachner* v. *United States*, *supra*, 517 F.2d at 597.

Bye is, of course, distinguishable on the two further grounds that 1) the decision did not take account or the Supreme Court's *Davis* decision nor consider the propriety of relief under section 2255, and 2) Bye explicitly stated that he was unaware of the parole provisions and would not have pleaded guilty if he had been properly informed, a requirement found necessary by this Court, 435 F.2d at 179 n.5.

mandatory special parole and the special parole term came to more than the maximum that the Court advised Ferguson he could impose. Moreover, in cases like *Ferguson* and *Michel*, the plea to one or two counts is obviously the result of a negotiated plea bargain. In those cases any misinformation with respect to the consequences of the plea might have affected the agreement to plead guilty, and the Government is motivated to negotiate to avoid the expense and uncertainties of a trial. Del Vecchio's plea was not the result of any such bargaining as is evident from the fact, first, that he pleaded guilty to so many counts with a maximum far in excess of life imprisonment and, second, that the Government plainly had no reason to negotiate with Del Vecchio, whose guilt was clear, 513 F.2d at 1197, when it was proceeding to trial against eighteen of his co-defendants only one week later. Finally, as noted above, p. 17, *Ferguson* did not discuss (nor did the Government raise) the procedural objection to the appropriateness of collateral attack that we contend is dispositive.

C. Del Vecchio's Failure To Appeal His Sentence Precludes Collateral Attack.

Quite apart from the considerations discussed thus far, Del Vecchio's failure to appeal his sentence precludes his collateral attack on it almost three years later. It is settled "that the writ of habeas corpus will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947). *Accord, Castellana* v. *United States*, 378 F.2d 231, 233 (2d Cir. 1967); *United States* v. *Gordon*, 433 F.2d 313, 314 (2d Cir. 1970); *Williams* v. *United States*, 334 F. Supp. 669, 671 (S.D.N.Y. 1971) (Weinfeld, *J.*), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972). Judge Friendly's opinion in *United States* v. *Sobell*, 314 F.2d 314, 323 (2d Cir.

1963) makes clear that a non-constitutional claim otherwise cognizable under section 2255 is barred unless "it was not correctible on appeal or there were 'exceptional circumstances' excusing the failure to appeal." The narrow compass within which failure to raise a non-constitutional claim on direct appeal may be excused is made clear by *United States* v. *Travers*, 514 F.2d 1171, 1177 (2d Cir. 1974), in which this Court, relying on *Sunal* v. *Large*, *supra*, said that, where non-constitutional claims are involved, "collateral relief will rarely be accorded to those who, even for apparently good reasons, did not exhaust the possibilities of direct review", even where the judicial decisions which made direct appeal seem futile were overruled only long after the time for direct appeal had expired and even though a grant of relief under section 2255 would have resulted not in a new trial but rather in dismissal of the charges. See also *United States* v. *Wright*, 524 F.2d 1100 (2d Cir. 1975); *United States* v. *Gordon*, *supra*. *Cf. Seiller* v. *United States*, *supra*, 544 F.2d at 561 n.9. Indeed, while Judge Friendly's opinion in *Sobell* suggests a considerably more liberal standard for the availability of relief under section 2255 for constitutional violations which might have been raised on direct appeal but were not, more recent authority in this Circuit, *United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974); *Williams* v. *United States*, *supra*, 463 F.2d at 1184-1185, and in the Supreme Court, *Kaufman* v. *United States*, 394 U.S. 217, 227 n.8 (1969), see also *Davis* v. *United States*, 411 U.S. 233, 239-242 (1973), establish that the restrictions on the assertion under section 2255 of even constitutional claims that might have been raised on direct appeal are nearly as stringent as for non-constitutional ones.

In this case there is every reason to reject Del Vecchio's claim as foreclosed by his failure to raise it at the time of his sentence and on direct appeal. If Del Vecchio

was in fact surprised by the imposition of a term of special parole, he was certainly fully aware of all the necessary circumstances to make this present claim the moment that Judge Duffy pronounced sentence. No sufficient justification or explanation has been made, or could be, for Del Vecchio's failure to raise on direct appeal the claim now made. That such an appeal might have been taken was obvious enough from *McCarthy* v. *United States, supra*, and *Bye* v. *United States, supra*, which were decided nearly five years before the plea in this case was accepted and upon which Del Vecchio now relies in his brief.

The reasons for this rule are obvious and require little elaboration beyond what Judge Friendly said in *United States* v. *Sobell, supra*, 314 F.2d at 324-325, in response to a somewhat more meritorious claim than Del Vecchio's:

> "We think it important to emphasize, as did the Supreme Court in *Sunal* v. *Large*, the policy considerations underlying what may seem to some a hoary and technical rule—'that the writ of habeas corpus will not be allowed to do service for an appeal.' 332 U.S. at 178, 67 S.Ct. at 1590. The problem, as Mr. Justice Douglas there said, 'has radiations far beyond the present cases.' 332 U.S. at 181, 67 S.Ct. at 1592. There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause 'litigation in these criminal cases [to] be interminable' 332 U.S. at 182, 67 S.Ct.

> at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. If the point on which Sobell now relies had been raised and sustained on appeal, that would on no account have led to a direction for acquittal. Even under all the elaborate safeguards with which this country properly surrounds those charged with crime, it would have led only to a new trial, in which it seems unlikely that the result as to any of the defendants would have differed. When a claim is raised upon direct appeal as this could have been, and is there sustained, a new trial can be had seasonably, when witnesses are still available and their recollections still fresh. In contrast, collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend he is entitled to that relief from the courts. When a defendant who has been tried fairly in accordance with law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment. See Fuld, *J.*, in *People* v. *Howard*, 12 N.Y. 2d 65, 236 N.Y.S. 2d 39, 187 N.E. 2d 113 (1962)."

These words describe with particular eloquence the precise situation in this case.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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